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The Paternity Suit in Europe

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CONCLUSION

In many aspects of negotiable instruments law, the American and Geneva Uniform Law are similar, if not identical. It is apparent that American courts and legislatures, in order to serve the same ends as those of the Geneva Uniform Law, have been strict in their interpretation of the requirements of negotiability. In those instances where the American negotiable instruments law and the Geneva Uniform Laws are different, the American courts and legislatures, as demonstrated, have reduced these differences to virtual uniformity by their more liberal approach. Whether this legislative and judicial tendency is deliberate or inadvertent is not a vital question. However, to recognize that this tendency exists may have great practical significance. Perhaps this American legislative and judicial *tendency* will develop into pronounced *policy* with the efforts of astute commercial law advocates.

MARSHALL L. COHEN

THE PATERNITY SUIT IN EUROPE

The purpose of this Comment is to present a survey of European laws dealing with suits (a) to establish paternity and (b) to deny paternity. While the language used in both of these proceedings is similar, their basic nature differs greatly. The former, instituted by an illegitimate (natural) child or, more frequently, by an unmarried female on behalf of her child, has the ultimate aim of establishing the identity of the father of the child. The benefits sought to be derived from a successful suit range from support for the child to full "status rights."¹ The suit to deny paternity, however, is brought by a married male against a child of his wife, seeking to overcome the presumption of paternity and to have his presumptive relationship with the child declared nonexistent.

Because of the relatively greater incidence and importance of the suit to establish paternity, more attention will be given it. Such topics as the limitations on the rights to institute paternity proceedings, defenses available to the alleged father, statutes of limitations and the different treatment given to children of unwed mothers and the offspring of incestuous or adulterous relationships will be considered.

This survey is divided into three parts. The first is a discussion of the French law followed by a discussion of the various European nations which, to some extent, follow the French system. A brief history of the French development is presented to reveal the framework upon which is built the present law

1. "Status rights" are all the rights normally attained by a legitimate child from the relationship of such child with its father. Among the "status rights" are inheritance, support and the name and citizenship of the father. The term is commonly used in all European nations.

of France and its "followers." The second part presents a discussion of West Germany and the nations that have patterned their laws after the German example. Finally, the Russian Code is discussed with a brief history of its development, followed by a short survey of the laws of Communist bloc nations.

In addition to much overlapping among these three groups, a number of nations defy categorization and have been placed in one group or another for contrast, if for no other reason. This will be most evident in the third division encompassing Russia and the Eastern European nations.

PART I. THE FRENCH MODEL AND ITS ADHERENTS

*France*²

Prior to the French Revolution (1789-1804) the right to institute paternity proceedings was unrestricted and the suit itself was in the nature of an action for support. Toward the end of the eighteenth century the suits became more frequent, exposing scandalous affairs of the nobility and establishing a fertile ground for blackmail.³ Consequently, the second year of the Revolution saw the enactment of a law completely prohibiting paternity suits,⁴ and the French Civil Code of 1804 incorporated this provision.⁵

During the second half of the nineteenth century signs of the decline of this harsh policy began to appear. Decisions of the courts provided a means of circumventing the absolute prohibitions of the code. Tort actions for seduction were allowed with damages awarded in the form of monthly support payments for the illegitimate (natural) child.⁶ Using contract principles, unilateral promises contained in private letters were made binding, although unsupported by any consideration other than a "natural obligation" to make support payments.⁷ By 1912 these judicially created "paternity suits" were officially recognized and enacted into positive law.⁸

This long history of the disapproval of paternity suits is reflected in the French law of today. At the present time, suits can be brought by the illegitimate child or its representative only in the following situations: (1) where the mother is the victim of a rape by the putative father during the statutory conception

2. The law of Luxemburg and Belgium with respect to paternity and denial of paternity suits is essentially the same as in France. Since the differences are minimal, a separate treatment of Belgium and Luxemburg law is not required.

3. See 1 Planiol-Ripert, *Treatise on the Civil Law* No. 1520 (12th ed. La. State Law Inst't 1939); see generally Brissaud, *A History of French Private Law* §§ 169-75 (1912).

4. Law of 11th Brumaire, year II.

5. Code Civil art. 340 (Fr. 63d ed. Dalloz 1964).

6. See, e.g., Judgment of Cour de Cassation (Ch. civ.), July 17, 1911, [1915] Dalloz Jurisprudence I. 52; Judgment of Cour d'Appel de Caen, 1862, [1862] Dalloz Jurisprudence II. 129; Judgment of Cour d'Appel de Nîmes, March 18, 1901, [1902] Sirey Recueil Général II. 208; Judgment of Cour d'Appel de Grenoble, March 24, 1908, [1910] Dalloz Jurisprudence II. 134.

7. See, e.g., Judgment of Cour de Cassation (Ch. civ.), April 3, 1882, [1882] Dalloz Jurisprudence I. 150; Judgment of Cour de Cassation (Ch. civ.), July 30, 1900, [1901] Dalloz Jurisprudence I. 502, [1901] Sirey Recueil Général I. 259; Judgment of Cour de Cassation (Ch. civ.), April 20, 1912, [1912] Sirey Recueil Général I. 214.

8. Law of Nov. 16, 1912, amending Code Civil art. 340 (Fr. 1804).

span;⁹ (2) where the mother is seduced by means of fraudulent promises of marriage or abuse of authority;¹⁰ (3) where the mother is in possession of a writing containing an admission of paternity by the putative father;¹¹ (4) where there was a notorious cohabitation of the mother with the alleged father during the statutory conception span;¹² or (5) where support payments or contributions to the education of the child have been made by the putative father.¹³

Even if a mother and her illegitimate child are able to institute a paternity suit based on one of the above grounds, their chances of success are severely limited by the peremptory "exceptions of inadmissibility" available to the alleged father, which prevent the court from considering the merits of the case.¹⁴ Paternity suits are summarily dismissed if: (1) it can be shown that the mother has had sexual relations with several men during the statutory conception span or has been *otherwise notoriously immoral*;¹⁵ (2) it can be shown that the putative father is physically incapable of bringing about conception;¹⁶ (3) blood test results exclude the possibility of paternity;¹⁷ or (4) it can be shown that the child is the result of an incestuous or adulterous relationship.¹⁸ Of course, if the father is unable to prove any of these "exceptions of inadmissibility," the plaintiff still has the burden of proving paternity.

In most cases the alleged father will defend in the action. If the putative father is a minor, his parent or guardian must defend in the respondent's behalf.

9. Code Civil art. 340, para. 1(1) (Fr. 63d ed. Dalloz 1964).

The statutory conception span is a concept created by the French Civil Code. See Code Civil art. 312 (Fr. 63d ed. Dalloz 1964). The span itself is a period from 180 to 300 days running back from the date of birth of the child. The number of days is derived from the medical formulation of the human gestation period. If it can be shown that the alleged father has had sexual intercourse with the mother during this period, a presumption arises that this intercourse is the one from which the child was conceived. With the exception of Norway, the statutory conception span concept is used in all European nations. The number of days, however, may vary slightly in either direction. See, e.g., Schweizerischen Zivilgesetzbuch (Civil Code) art. 314 (Swit. 1907).

10. Code Civil art. 340, para. 1(2) (Fr. 63d ed. Dalloz 1964); see, e.g., Chamoine v. Demoiselle Dianne, Cour de Cassation (Ch. civ., 1^{re} sect.), December 1, 1954, [1955] Dalloz Jurisprudence 253; B. v. Demoiselle H., Cour de Cassation (Ch. civ., 1^{re} sect.), February 23, 1960, [1960] Dalloz Jurisprudence 354 (note M. Holleaux).

11. Code Civil art. 340, para. 1(3) (Fr. 63d ed. Dalloz 1964); see, e.g., L. v. Demoiselle R., Cour de Cassation (Ch. civ.), February 18, 1930, [1931] Sirey Recueil Général I. 41 (note M. Geny).

12. Code Civil art. 340, para. 1(4) (Fr. 63d ed. Dalloz 1964); see, e.g., Demoiselle B. v. L., Cour de Cassation (Ch. civ.), February 7, 1922, [1922] Sirey Recueil Général I. 321 (note M. Cassin).

13. Code Civil art. 340, para. 1(5) (Fr. 63d ed. Dalloz 1964); see, e.g., Demoiselle B. v. P., Cour de Cassation (Ch. civ.), July 11, 1935, [1935] Sirey Recueil Général I. 367.

14. See Code Civil art. 340, para. 2 (Fr. 63d ed. Dalloz 1964).

15. Code Civil art. 340, para. 2(1) (Fr. 63d ed. Dalloz 1964).

16. Code Civil art. 340, para. 2(2) (Fr. 63d ed. Dalloz 1964).

17. Code Civil art. 340, para. 2(3) (Fr. 63d ed. Dalloz 1964) (added by Law of July 15, 1955); see, e.g., Belhannane v. Dame Soudani, Cour de Cassation (Ch. civ., 1^{re} sect.), October 11, 1955, [1956] Dalloz Jurisprudence 213 (note M. Rouast).

18. See, e.g., Trouillot v. Epoux Habert, Cour de Cassation (Ch. civ.), February 8, 1927, [1927] Sirey Recueil Général I. 361 (note M. Hugueney); Epoux D. v. F., Cour de Cassation (Ch. civ., 1^{re} sect.), December 8, 1959, [1960] Dalloz Jurisprudence 241 (note M. Savatier).

Also, under French law the right to bring suit survives the death of the alleged father. In such case, provision is made for the heirs of the putative father to defend in his place and liberal third party procedure is provided to allow interested parties to be brought in or to intervene to aid the court.¹⁹

Another factor discouraging the filing of a paternity action is the threat of a one to five year imprisonment for malicious prosecution. If the paternity suit proves unsuccessful and bad faith can be shown on the part of the one bringing the suit, the same civil court that handled the paternity action has power to impose this punishment. The action for malicious prosecution can be instituted either by the alleged father or by the court itself.²⁰

The statute of limitations allows a two year period within which a paternity suit may be instituted.²¹ The date on which the statute begins to run is dependent upon the ground used to bring the suit. If the suit is based upon the notorious cohabitation of the mother and alleged father the statute begins to run from the date such relationship was interrupted.²² If the suit is grounded upon the payment of support by the putative father, the two years begin from the date such payments are discontinued.²³ In all other cases the statute starts to run on the date of birth of the child.²⁴ If no action is brought on behalf of the child during the periods set out above, the child upon reaching majority, is given one year to bring a paternity action in his own right.²⁵

The French law looks with disfavor upon the children of an adulterous or incestuous relationship. Such "adulterous or incestuous children" are prohibited from bringing a paternity action, and in fact, the father is not allowed to declare paternity of the child.²⁶ Under exceptional circumstances, however, paternity can be declared with respect to "adulterous" children. Thus, such a declaration is allowed upon the intermarriage of the child's parents,²⁷ which in turn is only possible after the divorce of the adulterous party. If the mother is the adulterous party, a declaration by the alleged father will be allowed if a successful denial of paternity suit has been brought by the mother's former husband or if the mother has been involved in a separation and divorce proceeding during the statutory conception span.²⁸ If the adulterous party is the father of the child, the child may become legitimized by a declaration of paternity by the father which may be given at any time, or by a subsequent marriage of the father with the mother.²⁹ The more liberal treatment of children of adulterous

19. See Code Civil art. 339 (Fr. 63d ed. Dalloz 1964).

20. Law of Nov. 16, 1912, borrowing the penalty provisions from French Penal Code. See 1 American Series of Foreign Penal Codes, France art. 400 (1960).

21. Code Civil art. 340, para. 7 (Fr. 63d ed. Dalloz 1964).

22. Code Civil art. 340, para. 5 (Fr. 63d ed. Dalloz 1964).

23. Code Civil art. 340, para. 5 (Fr. 63d ed. Dalloz 1964).

24. Code Civil art. 340, para. 4 (Fr. 63d ed. Dalloz 1964).

25. Code Civil art. 340, para. 7 (Fr. 63d ed. Dalloz 1964).

26. See Code Civil art. 335 (Fr. 63d ed. Dalloz 1964) (Such declarations are *void*.).

27. Code Civil art. 331 (Fr. 63d ed. Dalloz 1964).

28. See Code Civil art. 331 (Fr. 63d ed. Dalloz 1964).

29. Law of July 5, 1956.

fathers, with respect to the ability of such father to declare paternity, can be attributed to the influence of laws enacted during the Nazi Occupation of World War II.³⁰ The provisions were repealed following the war³¹ but similar provisions were re-enacted in 1956.³²

A successful paternity action results in an order directing the father to make support payments to the child. Although the identity of the mother and father is established, the illegitimate child is not and cannot become a member of his father's family, *i.e.*, a successful suit does not bring "status rights."³³

The presumption of legitimacy that arises when a child is born of a married mother,³⁴ the burden of proof placed on the husband, and the dubious finality of judgments declaring the loss of legitimacy,³⁵ make a successful denial of paternity suit almost as difficult as a suit to establish paternity. To overcome the strong presumption of legitimacy the "presumed father" (husband) must prove impossibility of cohabitation during the entire statutory conception span³⁶ or prove that the mother committed adultery and concealed her pregnancy and delivery of the child.³⁷ A successful denial of paternity action, moreover, is always subject to the collateral attack of the child and is not a bar to a suit by the child to regain legitimacy.³⁸

Italy

Many of the some policies that were noted in the French Code are found in the Italian Civil Code. Restrictions upon the right to bring paternity suits, limitations on the benefit derived from successful paternity suits and difficult conditions surrounding denial of paternity are policies evident in both France and Italy.

In Italy, a paternity suit may be brought only upon the following grounds:³⁹ (1) a notorious cohabitation of the mother and alleged father during the statutory conception span; (2) a finding of paternity which was an indirect result of a civil or criminal judicial decree rendered by an Italian court in

30. Law of Sept. 14, 1941, art. 2.

31. Ordinance of May 3, 1945.

32. Law of July 5, 1956.

33. See Code Civil art. 338 (Fr. 63d ed. Dalloz 1964).

34. Code Civil art. 312 (Fr. 63d ed. Dalloz 1964); see, *e.g.*, Robert v. Fontaine, Cour de Cassation (Ch. req.), February 1, 1876, [1876] Sirey Recueil Général I. 373.

35. Code Civil art. 342 bis. (Fr. 63d ed. Dalloz 1964).

36. Code Civil art. 312 (Fr. 63d ed. Dalloz 1964).

37. Code Civil art. 313 (Fr. 63d ed. Dalloz 1964).

38. Code Civil art. 328 (Fr. 63d ed. Dalloz 1964): "L'action en réclamation d'état est imprescriptible à l'égard de l'enfant." The right of the child to attack a judgment of non-paternity resulting from a successful denial of paternity action has its roots in the fact that he was not a party to the denial of paternity suit. Such suit was defended by the mother in the child's name. The child not being a party, the prior judgment has no *res judicata* effect in a subsequent suit by the child. Since there is no statute of limitations upon this special action called *reclamation d'état*, it can be brought at any time. This right of the child, in European terminology, is a "collateral attack."

39. Codice Civil arts. 269-70 (Italy 1942).

something other than a paternity action;⁴⁰ (3) a writing signed by the putative father which unequivocally acknowledges paternity; (4) a rape committed by the alleged father upon the mother during the statutory conception span and set forth in a final judicial decree of an Italian criminal court; (5) a notorious "holding out" by the alleged father that he is, in fact, the father of the child.

The right of a child born of an incestuous or adulterous relationship to institute a paternity action is even more restricted. Such children can bring paternity suits only:⁴¹ (1) if their adulterous or incestuous conception was established indirectly by a civil or criminal judicial decree rendered by an Italian court in something other than a paternity action brought by the child;⁴² or (2) if their status of illegitimacy resulted from an invalidation of a marriage; or (3) if they can produce a writing signed by the putative father which unequivocally acknowledges paternity.

A successful paternity action results in a duty being placed upon the father to provide support for the child. The child receives no other "status rights" and if the mother is an alien, the child does not acquire the Italian citizenship of the father.⁴³

Children born of a married mother are placed in a position similar to that described in the French system. The same presumption of legitimacy arises and the right of the husband of the mother to institute a suit denying paternity is subject to similar stringent restrictions. The grounds for such a "denial suit" are limited to a showing of:⁴⁴ (1) an impossibility of cohabitation during the statutory conception span, for example, due to distance or sickness; (2) a legal separation; (3) adultery of the wife coupled with a dissimulation of the pregnancy; or (4) the impotency or sterility of the husband.

Portugal

In most respects the Portuguese law dealing with paternity suits and denial of paternity actions is similar to its French counterpart. There are, however, some distinct differences. The Portuguese Civil Code provides the illegitimate child, or its representative, with the right to request interlocutory support payments from the alleged father pending the outcome of the paternity suit,⁴⁵ as well as a right to support from its parents⁴⁶ and from its brothers and sisters.⁴⁷

The Portuguese law is even harsher in its treatment of "incestuous" or "adulterous" (*espúrios*) children than the French Code. The right of such

40. Such a finding is typified by a finding in a rape prosecution or a suit for damages for seduction that a child was born as a consequence of the rape or the seduction.

41. *Código Civile* arts. 251-53 (Italy 1942).

42. See note 25, *supra*.

43. *Código Civile* art. 260 (Italy 1942).

44. *Código Civile* arts. 244-45 (Italy 1942).

45. Decree for Protection of Children art. 44 (Portugal 1910).

46. *Código Civil* art. 129 (Portugal 1867).

47. *Código Civil* art. 175 (Portugal 1867).

children to bring paternity suits is completely prohibited in Portugal.⁴⁸ Furthermore, because of the broad definition of incest in Portugal, the class of children born of an incestuous relationship is unusually large. A child is deemed the offspring of an incestuous relationship if it can be shown that a relationship by "alliance" (or affinity) other than that of man and wife existed between the parents. For example, if a child results from a sexual relationship between a man and his sister-in-law, he is deemed to be an "incestuous" child. This differs from most nations where incest is usually defined as a sexual relationship between persons who are so closely related as to be prohibited from marriage.⁴⁹ Moreover, the Portuguese consider such a child to be "incestuous" even if the marriage that gave rise to the brother-in-law, sister-in-law relationship between the child's parents has been terminated. Thus, even if a man's marriage has been terminated, if a child is conceived through sexual intercourse between the man and his former sister-in-law, the child is still "incestuous." For this reason the class of "incestuous" children becomes relatively large when compared to the same class in other nations.

Spain

The Spanish paternity laws⁵⁰ differ from their French model in three major respects. First, a successful paternity suit results in granting to the illegitimate child certain status rights. In addition to support rights, a successful paternity suit under Spanish law entitles the illegitimate child to the name and citizenship of the father and places upon the father the same duties that are owed to legitimate children. This differs from the French law where only support payments result from a successful paternity suit.

The second major difference is found in the Spanish treatment of children conceived of an adulterous or incestuous relationship. Unlike France, where suits by such children are barred, Spain allows such children the same right to institute paternity suits as other illegitimates. A distinction is made, however, since the remedy available to the "adulterous" or "incestuous" child is limited to support payments from the father.⁵¹

The third major difference between the French and Spanish Codes lies in the statute of limitations provisions.⁵² In Spain, the illegitimate child is able to bring suit at any time during the alleged father's life. Normally, the child's right to institute suit is cut off at the time of the putative father's death. If, however, a writing of the alleged father indicating paternity is discovered after the father's death, suit can be brought against the executor or heirs of the deceased.

48. Código Civil art. 22 (incest), art. 23 (adultery) (Portugal 1867).

49. See, e.g., Planiol-Ripert, *op. cit. supra* note 3, § 1013.

50. See Código Civile arts. 108-13, 137, 140 (Spain 1889).

51. See Código Civile art. 140 (Spain 1889).

52. See Código Civile art. 137 (Spain 1889).

PART II. THE GERMAN MODEL AND ITS ADOPTERS

West Germany

Unlike other European nations where paternity suits can be brought only on enumerated and usually limited grounds, the West German Civil Code is liberal in its granting of the right to bring paternity suits. A paternity suit may be brought against any man having sexual intercourse with the mother during the statutory conception span.⁵³ Also, paternity suits, which are usually considered as a cause of action belonging to the illegitimate child or its representatives, may be brought during the mother's pregnancy.⁵⁴ A paternity action must be brought within four years following the child's birth.

Along with the liberal grounds for bringing the paternity suit, liberal defenses are available to the alleged father. The *exceptio plurium concumbentium* defense, in which the alleged father asserts that he is only one of several men who have had sexual intercourse with the mother during the statutory conception span, is a complete defense to a paternity action.⁵⁵ Other defenses available to the putative father are the impossibility of procreation by reason of sterility or impotency, and the mother's antedating pregnancy, *i.e.*, pregnancy before the intercourse with the alleged father. Furthermore, since witnesses and parties are compelled by law to submit to blood tests and medical examinations,⁵⁶ abundant medical data is available to the alleged father to prove such asserted claims as impotency or sterility. With the exception of the *exceptio plurium* defense, failure to promptly assert a defense will not be considered a waiver of that defense and the alleged father will be able to assert it at any time.

A successful paternity suit results, as in the French system, in the granting of support payments by the father to the child. Unlike other nations where the support decree is theoretically based on a natural obligation owing to the child by the father, the German award is more in the nature of an award in damages for medical expenses and alimony as compensation for the wrong committed by the father.⁵⁷ However, the child's right to support is substantial and, in some instances, more desirable than the support due to a legitimate child. The support decreed in a paternity suit is measured not by the father's ability to pay or the child's needs, as is the case in an action for support by a legitimate child,⁵⁸ but rather by the social status of the mother.⁵⁹

The support based on the mother's social status continues until the child reaches the age of eighteen years, but when the child reaches the age of sixteen

53. 191-302 days; Bürgerliches Gesetzbuch [hereinafter cited as B.G.B.] § 1592 (Germany 1896).

54. B.G.B. § 1716 (Ger. 25th ed. Palandt 1966).

55. B.G.B. § 1717 (1) (Ger. 25th ed. Palandt 1966).

56. Zivilprozessordnung (Code of Civil Procedure) [hereinafter cited as Z.P.O.] §§ 640, 644 (Ger. 39th ed. Beck 1965).

57. See B.G.B. § 1715(1) (Ger. 25th ed. Palandt 1966).

58. See B.G.B. §§ 1602-03 (Ger. 25th ed. Palandt 1966).

59. See B.G.B. § 1708(1) (Ger. 25th ed. Palandt 1966).

any money the child earns may result in a decrease of his father's obligation.⁶⁰ The payments must be in cash and paid trimestrially, in advance.⁶¹ Moreover, once the right to support is established, it survives the death of the father, and falls upon his heirs⁶² who may elect to pay the natural child what would be due him if he were a legitimate child rather than make the decreed support payments.⁶³

Aside from the right to support granted in a successful paternity suit, the child gains none of the other status rights; a blood relationship is not recognized between the father and the child.

Provision is made, however, for a voluntary admission of paternity by the father which may result in the establishment of a "partial" family relationship between the illegitimate child and the admitting father.⁶⁴ Upon the admission the child obtains the name and citizenship of the father along with the right to support and inheritance from him. The child cannot claim support or inheritance from the paternal grandparents as can legitimate children, nor does the child's spouse become a member of the family in any respect.⁶⁵

In addition to the benefits given to the child, a successful paternity suit will result in the granting of damages to the mother for medical expenses incurred and payments in the nature of alimony for a period of six weeks following the birth of the child.⁶⁶ When the suit is commenced before the birth of the child, anticipatory damages, identical to those just described, are awarded to the mother.⁶⁷ Since paternity suits are limited by the four year statute of limitations these benefits to the mother are similarly limited.

A suit to deny paternity in West Germany is substantially the same as that in the French system, and thus, does not require separate treatment here.

One interesting aspect of the German law deserves mention, and that is the "declaratory judgment of filiation" (*Abstammungsurteil*).⁶⁸ An action for such a judgment may be brought at any time by an illegitimate child asking the court to summarily declare his filiation to the alleged father. A successful action for a declaratory judgment may void a prior court finding which established a third party's obligation to support the child, or may be used in a retrial of a prior unsuccessful claim of the child. This action is much like the French *reclamation d'etat*,⁶⁹ but unlike the *reclamation d'etat* which concerns itself only with status, the German *Abstammungsurteil* opens for relitigation not only the issue of status but also all other issues involved in the prior suit; for example, support, damages, and support payable by a third party against whom a successful pa-

60. B.G.B. § 1708(1) (Ger. 25th ed. Palandt 1966).

61. B.G.B. § 1710 (Ger. 25th ed. Palandt 1966).

62. B.G.B. § 1712(1) (Ger. 25th ed. Palandt 1966).

63. B.G.B. § 1712(2) (Ger. 25th ed. Palandt 1966).

64. See B.G.B. § 1723 (Ger. 25th ed. Palandt 1966).

65. B.G.B. § 1737 (Ger. 25th ed. Palandt 1966).

66. B.G.B. § 1715(3) (Ger. 25th ed. Palandt 1966).

67. B.G.B. § 1716(1) (Ger. 25th ed. Palandt 1966).

68. Z.P.O. art. 644 (Ger. 39th ed. Beck 1965).

69. See note 38 *supra*.

ternity suit has resulted in an obligation to make support payments may be relitigated. This instability of judicial determination has been severely criticized by authors of family law treatises.⁷⁰

East Germany

In general, the law of East Germany is similar to that of West Germany. The major difference lies in the question of support payments. In East Germany support is based upon the needs of the child and the ability of both parents to make such payments.⁷¹ This is in contrast to the West German system where support rights are based on the social status of the mother. However, there are also funds available from welfare agencies for the protection of the illegitimate child and its mother.⁷² One further difference is that in East Germany the defense of *exceptio plurium* may be waived if it is not promptly asserted.⁷³

Austria

In Austria the law with respect to paternity and denial of paternity suits is essentially the same as that of West Germany. However, some differences and peculiarities should be pointed out.

One difference is that the *exceptio plurium* defense, which in West Germany precludes a finding of paternity, is unavailable to the alleged father. Another difference appears in the support rights available to the illegitimate child who is successful in a paternity suit. Unlike West Germany, Austria allows the support payments to be extended beyond the child's minority⁷⁴ and the court may take into consideration all relevant factors in determining the amount of the support payments. Relevant factors include the child's needs, the ability of the mother and father to pay, and the social status of the parents. Also, Austria encourages extrajudicial settlements between the alleged father, the mother and the child under the supervision of the welfare department.⁷⁵

A distinctive feature of Austrian law is its use of the "non-adoptive name donation" (*Einbenennung*).⁷⁶ This concept allows an illegitimate child to use the surname or title of nobility⁷⁷ of the mother's husband (despite the fact that he is not the father) without placing the responsibilities of formal adoption upon him.⁷⁸ To some extent the technique conceals the illegitimacy of the child, and

70. E.g., 4 Soergel-Siebert, *Bürgerliches Gesetzbuch* 264-67 (9th ed. Kohlhammer Verlag Stuttgart 1963).

71. *Mutterschutzgesetz* (Law for the Protection of Mothers) § 17 (East Ger. 1950).

72. *Mutterschutzgesetz* (Law for the Protection of Mothers) § 3 (East Ger. 1950).

73. See *Bürgerliches Gesetzbuch* art. 1718 (East Ger.).

74. See *Allgemeines Bürgerliches Gesetzbuch* (Civil Code of 1811 as amended) [hereinafter cited as A.B.G.B.] § 170 (Aus. 8th ed. Manz 1964).

75. See *Jugendwohlfahrtsgesetz* (Youth Welfare Law of 1954) art. 18(3) which provides for binding effect to be given to settlements concerning support rights when made before the *Bezirksverwaltungsbehörde* (local welfare department). No other settlement can be binding or litigated in court.

76. See A.B.G.B. § 165 (Aus. 8th ed. Manz 1964).

77. A.B.G.B. § 165(1) (Aus. 8th ed. Manz 1964).

78. A.B.G.B. § 165(2) (Aus. 8th ed. Manz 1964).

fulfills the Austrian policy that "natural children should not be prejudiced with respect to social esteem or their advancement."⁷⁹

Holland, Finland and Iceland

All three nations have patterned their laws after the example of Austria but each differs from that nation in certain respects.

The Dutch Code differs from the Austrian Code in that the "non-adoptive name donation" procedure has not been accepted⁸⁰ and the harsh treatment of the children of incestuous or adulterous relationships has been adopted from the French Code. The Finnish law departs from its Austrian model in that it provides natural children with support rights which run concurrently between father and the maternal relatives of the child who are able to make support payments.⁸¹ The law of Iceland is peculiar in providing the child, or its representative, with a line of proof which precludes the putative father from setting up a defense and will be considered conclusive proof of paternity. The provision requires that the child prove an uninterrupted cohabitation of the putative father and the mother for a period of time commencing three hundred days before the birth of the child and continuing until two years after the birth.⁸²

Sweden

The Swedish law with respect to paternity suits is rather unique. As soon as an unwed woman becomes aware that she is pregnant she is under a legal duty to report this fact to the local authorities. The authorities in turn appoint a special guardian, a *Kinderpfleger*,⁸³ who is given the responsibility of investigating the paternity of the child. To aid in this investigation the special guardian is given free use of police facilities. It is only after this investigation by the special guardian that a paternity suit can be brought on behalf of the child. Liberal grounds are afforded for the bringing of such suit.

Most of the traditional defenses are available to the alleged father. The *exceptio plurium* defense, however, is not peremptory, as it is in France; rather it is just one factor that must be considered in the making of a final decision on the issue of paternity. Blood tests of the parties involved are compulsory and the results of such tests, if favorable to the alleged father, are conclusive.⁸⁴

Consideration of the results of a successful paternity action reveals another concept that is peculiar to Sweden. A successful suit can produce support rights alone or support rights coupled with status rights, depending on whether the

79. A.B.G.B. § 162 (Aus. 8th ed. Manz 1964).

80. Burgerlijk Wetboek (Civil Code) art. 343 (Neth. 1838).

81. See Law of Natural Children of July 27, 1922 as amended in 1927 and 1948 (Fin.); Law for Increasing Support Payments of March 16, 1951 (Fin.). No criteria is given in the statutes to determine the maternal relatives able to make support payments; presumably it must be decided on a case by case basis.

82. Law of Parental Relations of June 27, 1921 § 3 para. 2 (Iceland).

83. *Föräldrabalk* (Parents and Children Code) ch. 8, §§ 1-6, 8-10 (Swed. 1949).

84. Blood Test Law No. 385 of June 10, 1949 (Swed.).

child is the typical illegitimate or what the Swedish call a "bride child." The "bride child" is defined as a child born as a result of the cohabitation of an engaged man and woman.⁸⁵ The typical illegitimate child's remedy is limited to support, while the "bride child" acquires both support and status rights. The introduction of the "bride child" concept results in the unlikely situation of having three categories of children: legitimate, "bride children," and illegitimate.

The Swedish treatment of denial of paternity suits is identical to that found in the French Code and does not bear separate treatment.

Switzerland

The treatment given to paternity suits in Switzerland⁸⁶ is a combination of German, French and Swedish law. The liberal German policy towards the bringing of paternity suits is adopted,⁸⁷ but, as in the French system, the child or his representative has no right to institute suit if the child is the result of an incestuous or adulterous relationship.⁸⁸ The results of a successful paternity suit resemble the Swedish system in that, from the entire class of illegitimate children, a sector is carved out which will receive a limited number of status rights in addition to support payments. In Sweden this sector was limited to "bride children," while in Switzerland the sector is limited to children born of a rape or a malicious seduction. Illegitimate children not falling into the latter category and not the offspring of an incestuous or adulterous relationship (who are barred from bringing suit) are limited to support rights alone.⁸⁹

Aside from a shorter, three month statute of limitations,⁹⁰ denial of paternity suits are treated essentially the same as in France and do not bear separate treatment here.

Norway and Denmark

In Norway illegitimate children are given liberal rights to bring paternity suits, and if they are successful they are granted full status rights and complete legal equality with legitimate children.⁹¹ Paternity actions may be instituted by local authorities who are under a legal duty to conduct an investigation of the child's parentage.⁹² Furthermore, it is only in the case of the failure of the local authorities to establish paternity that a suit can be instituted.⁹³ Also, there is no statutory conception span and the establishment of the moment of conception is left to the courts on a case-by-case method.

85. *Föräldrabalk* (Parents and Children Code) ch. 1, § 4 para. 1 (Swed. 1949).

86. Schweizerischen Zivilgesetzbuch (Civil Code) [hereinafter cited as Z.G.B.] (Swit. 1907).

87. See Z.G.B. art. 259 (Swit. 1907).

88. Z.G.B. art. 304 (Swit. 1907).

89. Z.G.B. art. 319 (Swit. 1907).

90. See Z.G.B. arts. 253, 257 (Swit. 1907).

91. See Arnholm, *The New Norwegian Legislation Relating to Parents and Children*, in 3 *Scandinavian Studies in Law* 18 (1959).

92. See generally Kruse, *A Nordic Draft Code* § 285 (1963).

93. See generally *id.* § 288.

A showing by the alleged father in a paternity suit that the mother has had notorious relationships with several men is not a complete defense. Such a showing, however, results in allowing the court to declare the one most likely to be the father⁹⁴ and this in turn results in granting to the child full status rights.⁹⁵ On the other hand, a showing of notorious relations of the mother in a denial of paternity suit is a sufficient basis to sustain the denial without a showing of impossibility by the husband.⁹⁶

The Danish provisions are almost identical to the Norwegian.⁹⁷ The child is given one convenience in Denmark which is not found in the Norwegian law. In contrast with the traditional European venue provisions requiring suits to be brought in the domicile of the father, the child may institute a paternity suit in its own domicile. One other difference between Norway and Denmark is that although in both nations natural children are given the same rights as legitimate children, in Denmark all parental rights are vested in the mother, notwithstanding the fact that the identity of the father has been determined.⁹⁸

Great Britain and Ireland

Great Britain allows liberal grounds upon which paternity suits may be instituted. The result of a successful suit, however, is limited to the right of support from the father. This right to support is more limited than on the Continent since the payments are required only until the child attains the age of thirteen years. The payments may be extended for an additional two years upon a showing of financial hardship by a mother who is not married or, if married, separated from her husband. Similarly the payments may be terminated before the child reaches the age of thirteen if the mother subsequently marries. The statute of limitations is only one year and begins to run from the child's birth or from the moment of discontinuance of voluntary support payments by the putative father.⁹⁹

The major difference between Great Britain and the other European systems is the treatment of denial of paternity actions. Most of the nations discussed thus far have patterned their denial of paternity suits after the French law in which the denial of paternity suit is difficult to maintain. By comparison, the English law seems to facilitate the denial of paternity suit. In Great Britain a child enjoys the status of legitimacy only when both the mother and father consent to register the child in the Register of Vital Statistics. To deny paternity all the alleged father need do is refuse to sign the certificate of registration. The result is that a denial of paternity suit, as such, need never be brought, since

94. Law No. 10 of Dec. 21, 1956 § 21 (Nor.); see also Arnholm, *op. cit. supra* note 91, at 19.

95. See Law No. 10 of Dec. 21, 1956 §§ 1, 5 para. 1 (Nor.); see also Danish Comm. on Comparative Law, Danish and Norwegian Law 56 (1963).

96. See Law No. 9 of Dec. 21, 1956 § 2 (Nor.).

97. Illegitimate Children's Law No. 131 of May 7, 1937 (Den.).

98. See Law of March 28, 1923 (Den.).

99. Affiliation Proceedings Act, 1957, 5 & 6 Eliz. 2, c. 55 § 2(2) (Gr. Brit.).

the husband is entitled to withhold his consent to register the child, in which case the child automatically assumes the status of a natural child.¹⁰⁰ Moreover, any interested third party may bring suit to contest the legitimacy of a child despite the fact that the father has registered the child. Such third parties may use the impotency or sterility of the husband to maintain their suit. Under Continental law these grounds are considered personal and can never be pleaded by anyone other than the putative father.

Perhaps as a counterweight for the ease with which paternity may be lost, England has given the right to petition for a declaratory judgment to the effect that he is a legitimate child of his parents to every resident of Great Britain or Northern Ireland.¹⁰¹

The Irish law differs very slightly from its English model. The differences primarily concern the right to support and provide that: (1) the natural children have a right to be supported by their father until the age of sixteen for female children and fifteen for male children; and (2) the natural children have a right to be supported by the actual father regardless of the fact of subsequent marriage by the mother.¹⁰²

Greece

The Greek Code¹⁰³ adopts a liberal policy toward the right to institute paternity suits and does not single out the children of adulterous or incestuous relationships for greater legal restrictions. A five year statute of limitations is provided to institute paternity suits and, if the putative father dies within that period, suit can be brought against his heirs.¹⁰⁴

In addition to the normal defenses available to the alleged father, he is given the *exceptio plurium* as a peremptory defense.¹⁰⁵ That is to say, if the alleged father can prove that the mother had notorious relations with several men during the statutory conception span, the court is precluded from finding that the alleged father is, in fact, the father of the child.

As in the Swedish law, the results of a successful paternity suit depend upon the relationship that existed between the parties at the time of conception. If the mother was under the guardianship, or other similar financial dependency, of the alleged father, the illegitimate child is able to obtain both support and limited status rights¹⁰⁶ much like the Swedish "bride child." In all other cases, the illegitimate child is limited to support rights.¹⁰⁷ Under Greek law the

100. See Births and Deaths Registration Act, 157, 1 & 2 Eliz. 2, c. 20 (Gr. Brit.).

101. Matrimonial Causes Act, 1950, 14 Geo. 6, c. 25 § 17 (Gr. Brit.).

102. Illegitimate Children (Affiliation Orders) Act, 1924, 14 & 15 Geo. 5, c. 27, § 1(1), (2) (No. Ire.).

103. Greek Civil Code (1940).

104. Greek Civil Code arts. 1540-42 (1940).

105. Greek Civil Code art. 1543 (1940).

106. Greek Civil Code art. 1555 (1940); Citizenship Code of Sept. 20, 1955, art. 3 (Greece).

107. Greek Civil Code art. 1540 (1940).

"non-adoptive name donation" is available to illegitimate children¹⁰⁸ and can relieve some of them of the taint of bastardy.

Aside from the one year statute of limitation which begins to run from the date of birth of the child,¹⁰⁹ denial of paternity suits¹¹⁰ are essentially the same as in France and do not bear separate treatment here.

PART III. THE SOVIET MODEL AND THE COMMUNIST BLOC

Soviet Russia

While Russia was under the rule of the Tzars, no paternity suits were allowed. The voluminous civil code¹¹¹ made the illegitimate child a *filius nullius*, i.e., a relative of neither the mother nor the father. Furthermore, members of the nobility, unlike the members of the lower classes, were prohibited from adopting illegitimate children. The child, being a *filius nullius*, was unable to impose any duties upon the father. The father, however, could be subject to a two year imprisonment for seduction.¹¹²

With the year 1907 came some liberalization of these old laws. A statute was enacted allowing the legitimization of an illegitimate child by the subsequent marriage of its parents. It also granted limited status rights to children born of a marriage subsequently invalidated and extended the right to adopt children to the nobility.¹¹³ A paternity suit, however, was still strictly forbidden.

In 1918 the Russian Soviet Federated Socialist Republic made a complete departure from the Tzarist system and from all European systems. In the Family Code of 1918, natural children were given equal rights, in every respect, with legitimate children,¹¹⁴ and the bar against paternity suits was removed. This policy was retained in the Family Code of 1926. Under both codes a *prima facie* case was established against an alleged father by merely having a pregnant woman swear out an affidavit stating the date of conception and the name and address of the putative father. Under the 1918 law such an affidavit had to be filed three months prior to the birth of the child, but the 1926 Code allowed the affidavit to be filed up to and including the date of birth.¹¹⁵ The affidavits could be made by a married or unmarried woman and could name as the father any male including a person other than the mother's husband, if she was married, and a man married to someone else.¹¹⁶ Once a *prima facie* case of paternity was established, the burden shifted to the alleged

108. Greek Civil Code art. 1531, para. 2 (1940).

109. Greek Civil Code arts. 1474-75 (1940).

110. Greek Civil Code arts. 1466, 1571, 1472 (1940).

111. *Svod zakonov Rossiiskoi Imperii*, published in 16 vols. (1832-1916).

112. Imperial Criminal Code art. 1531 (Russia). Cf. R.S.F.S.R. Criminal Code art. 118 (1963) (U.S.S.R.).

113. See Law of June 3-16, 1907, arts. 44(1), 145 (Russia).

114. R.S.F.S.R. Civil Status, Marriage, Family and Guardianship Code art. 133 (1918) (U.S.S.R.).

115. R.S.F.S.R. Marriage, Family and Guardianship Code art. 28 (1926) (U.S.S.R.).

116. R.S.F.S.R. Civil Status, Marriage, Family and Guardianship Code art. 140 (1918) (U.S.S.R.).

father to disprove the claim. By a statute of limitations¹¹⁷ in the 1918 Code, the putative father was given two weeks to institute a denial of paternity suit. This time was later extended to one month.¹¹⁸ The result of this procedure was to place upon the one named in the affidavit the burden of proving his non-paternity. This is in sharp contrast to the French system where the burden of establishing paternity remains at all times on the child.

A failure by the mother to file the affidavit within the prescribed time did not preclude her bringing a paternity suit after the birth of the child. In such cases, however, the burden of proving paternity stayed with the mother as the child's representative.

Under the 1918 Code the alleged father, by showing that the mother had sexual relations with several men during the statutory conception span, could have the obligation of supporting the child divided equally among all the potential fathers. Although the support obligation was split in this manner, all other parental obligations remained in the one named in the affidavit or the one against whom a paternity suit was brought.¹¹⁹ The 1926 Code modified this procedure. Once the notorious relationships of the mother were shown, it became the duty of the court to decide which of the several men was in fact the father and to place upon him all the paternal obligations, including support.¹²⁰

In 1944 all of these novel approaches to paternity were repealed.¹²¹ Strict prohibition of paternity suits was reinstated and the illegitimate child was allowed to assert his support rights only against the mother or the welfare department.¹²² This was not a complete return to the Tzarist system where the illegitimate child was considered a *filius nullius* and support of the child was seemingly dependent upon the humane instincts of the parents. Today the illegitimate child has at least a legal right to support from the mother and governmental agencies.

Rumania

Rumania has adopted a liberal policy toward the bringing of paternity suits and has statutory provisions requiring the participation of the district attorney and the local welfare agency in every such proceeding. The one year statute of limitations on such suits starts to run either from the birth of the child, from the discontinuance of cohabitation of the alleged father with the mother after the birth of the child, from the discontinuance of voluntary support payments by the putative father, or from the date of a final decree rendered

117. R.S.F.S.R. Civil Status, Marriage, Family and Guardianship Code art. 141 (1918) (U.S.S.R.).

118. R.S.F.S.R. Marriage, Family and Guardianship Code art. 29 (1926) (U.S.S.R.).

119. R.S.F.S.R. Civil Status, Marriage, Family and Guardianship Code art. 144 (1918) (U.S.S.R.).

120. R.S.F.S.R. Marriage, Family and Guardianship Code art. 32 (1926) (U.S.S.R.).

121. See R.S.F.S.R. Marriage, Family and Guardianship Code arts. 27, 29 (1926), as amended, Law of April 26, 1945 (U.S.S.R.).

122. Edict of the Highest Praesidium of the Soviet Union No. 37 of July 8, 1944, § 19 (U.S.S.R.).

in a denial of paternity suit resulting in the loss of the child's legitimate status.¹²³ No special treatment is given to children of an adulterous or incestuous relationship.

A successful paternity action brings to a natural child the same rights that are available to a legitimate child whose parents have been subsequently divorced.¹²⁴ These rights include monthly support payments based on the needs of the child and the ability of the parents to make such payments, full status rights, and the election of using either the mother's or the father's name.¹²⁵

Suits in denial of paternity can be brought on the grounds of impossibility, but proof of impotency is not accepted as proof of impossibility on the theory that medical findings in this area are unreliable.¹²⁶ Also a six month statute of limitations exists for such suits.

Albania, Bulgaria, Czechoslovakia, Hungary, Poland and Yugoslavia

The family codes of these six Eastern European Communist states are of recent vintage, all having been enacted between 1948 and 1953. In most respects they are the same as the Rumanian Code, which was the last to be enacted and which is in effect a synthesis of the provisions found in the codes of the six nations listed above. The law of these six Communist states do differ in some respects from the Rumanian Code.

In Bulgaria and Poland the statute of limitation on paternity suits is three years,¹²⁷ and in Yugoslavia it is five years. These are in contrast to the one year limit in the other nations. Also, in Hungary and Poland suit can be instituted during the pregnancy of the mother.¹²⁸

The *exceptio plurium* defense is unavailable to the alleged father in Poland, while in Albania¹²⁹ and Czechoslovakia¹³⁰ a showing of the notorious relationships of the mother is a basis upon which all "potential" fathers may be impleaded; this results in the duty of the court to decide from among them the identity of the actual father. In Yugoslavia¹³¹ and Hungary,¹³² on the other hand, it is a peremptory defense which, as in Greece and France, precludes a finding of paternity.

In addition, to further insure equality between natural and legitimate children, Czechoslovakia¹³³ and Yugoslavia¹³⁴ have adopted the use of the

123. Rumanian Family Code art. 60 (1953).

124. Rumanian Family Code art. 65 (1953).

125. Rumanian Family Code art. 64 (1953).

126. See Rumanian Family Code art. 54 (1953).

127. The same period applies to a denial by the child that he was born in wedlock; see Polish Family Law art. 75 (1958).

128. Decree 7 of 1953, arts. 3, 6 (Hung.); Polish Family Law art. 45 (1958).

129. Parental Relations Law No. 604 of 1948 art. 26 (Albania).

130. Domestic Relations Law No. 265 of 1965 art. 47 (Czech.).

131. See Parental Relations Law of 1947 art. 26 (Yugo.).

132. See Family Law No. 4 of 1952 § 38 (Hung.).

133. Law 265 of 1949 arts. 37 para. 2, 38 (Czech.).

134. Personal Names Law of 1947 art. 6 (Yugo.).

"non-adoptive name donation" procedure. Poland has adopted a procedure which allows a fictitious name to be introduced into the birth register of the Bureau of Vital Statistics in an effort to prevent the stigma of a "father unknown" inscription. This fictitious name is entered if no paternity suit is brought during the period allowed by the statute of limitations or if such a suit proves unsuccessful.¹³⁵

CONCLUSION

As in many areas of the law, the problems raised by the paternity issue present a myriad of conflicting social and legal interests. Each of these interests must be carefully analyzed and investigated before placing them into the scales for legislative and judicial determination. On the one hand there are the interests of the child, begotten not of his own will, but as a consequence of the act of its parents. Should this child be deprived of the rights he would have obtained by birth but for the fortuitous circumstance of being conceived out of wedlock? On the other hand the interests of the alleged father must be considered. Is it in anyone's interest to burden him with the responsibilities of fatherhood without substantial certainty that he is the parent? Then too, the interests of the mother and the community in general must be considered if a just and equitable solution is to be obtained.

This Comment has dealt almost exclusively with legislative enactments aimed at the paternity problem without an extensive exposition of the interplay of judicial construction and interpretation. But the wide variety of laws presented should serve as witness to the fact that no comprehensive and generally accepted scheme has as yet been developed.

The nations discussed in Part I, headed by France, seem to view the interests of the illegitimate child as subordinate to those of the alleged father. The severe restrictions upon the right to bring paternity suits, the several defenses available to the alleged father and the limiting of the remedies available to the successful child all serve to illustrate the above conclusion. Furthermore, with the exception of Spain, the nations discussed looked with increased disfavor upon the children of adulterous or incestuous relationships. This distinction seems to have no basis in logic or justice. The child is, in a sense, made to suffer for the sins of its parents. The child is no more at fault for his conception than other illegitimate children, yet he is completely barred from relief because his parents engaged in an activity that is considered peculiarly onerous to the general public.

Part II considered a number of nations that seem to have given more consideration to the interests of the child. Illustrative of this attitude is the fact that liberal grounds are provided upon which the paternity suit may be brought. There are exceptions, however. Great Britain for example, seems to have facilitated the denial of paternity, and Iceland, Finland and Switzerland

135. Family Code of Poland art. 36 (1958).

COMMENTS

have incorporated the harsh provisions toward "adulterous and incestuous" children. But perhaps more significant in Part II are the attempts at innovation seen in some states. The "non-adoptive name donation" and the increasing role of the welfare agencies are examples of the experimentation with new concepts.

Part III presented an interesting study in contrast. The Soviet Union, the ideological father of the Eastern European nations in other areas, appears at odds with those nations in the paternity field. While the Soviet Union goes even farther than the Part I nations in protecting the interests of the alleged father, the Communist bloc countries go farther than the Part II nations in affording protection to the child. This is a conflict difficult to explain.

This paper has shown a number of approaches to the problem involved; however it has not sought to indicate a preference for any one approach nor has it sought to set forth universal solutions. It is only after a meaningful discussion of the relevant issues and a thorough study of the means available to cope with the paternity problem, that significant and successful decisions can be reached. Perhaps through the comparative analysis of the various techniques and concepts developed by all legal systems comprehensive, workable, and just solutions can be derived. It is with this view that this work is presented.

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